

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

Case No. 02-4115-JAR

Defendant.

Plaintiff Bryan Roney brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of Defendant Commissioner of Social Security’s denial of his application for a period of supplemental security income benefits under Title XVI of the Social Security Act. According to plaintiff, defendant failed to properly assess his subjective complaints of pain, failed to accord adequate weight to the opinion of his treating physician, and failed in finding plaintiff’s limitations did not meet the criteria of an impairment listed in Appendix 1, Subpart P of 20 C.F.R. Part 404 (listing of impairments). As explained in more detail below, the Court concludes that the decision, in part, is not based on substantial evidence and/or based on an incorrect application of the law, and therefore the Court remands this case.

On January 29, 1999, plaintiff protectively filed his application for a period of disability and disability insurance benefits, claiming disability since May 6, 1965, due to mental impairments and seizures.

The application was denied both initially and upon reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing on November 17, 1999. Subsequent to that hearing the ALJ rendered a partially favorable decision finding plaintiff disabled on and after August 20, 1999. On September 19, 2000, the Appeals Council vacated that decision and remanded the claim for a supplemental hearing. The supplemental hearing was held on August 23, 2001, and on December 20, 2001, the ALJ rendered a decision denying all benefits on the basis that plaintiff was not under a "disability" as defined by the Social Security Act. After the ALJ's unfavorable decision, plaintiff requested review by the Appeals Council; his request for review was denied on May 23, 2002. Thus, the ALJ's decision is the final decision of defendant.

II. Standard of Review

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant's decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.¹ The Tenth Circuit has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.³

III. Relevant Framework for Analyzing Claim of Disability and the ALJ's Findings

"Disability" is defined in the Social Security Act as the "inability to engage in any substantial gainful

¹See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

²*Id.* (quoting *Castellano*, 26 F.3d at 1028).

³ *Id.*

activity by reason of any medically determinable physical or mental impairment”⁴ The Social Security Act further provides that an individual “shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy”⁵

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,⁶ and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.⁷ Step one determines whether the claimant is presently engaged in substantial gainful activity.⁸ If he is, disability benefits are denied.⁹ If he is not, the decision maker must proceed to the second step.¹⁰ Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has

⁴*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

⁵*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

⁶*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

a medically severe impairment or combination of impairments.”¹¹ This determination is governed by certain “severity regulations,” is based on medical factors alone, and, consequently, does not include consideration of such vocational factors as age, education, and work experience.¹² Pursuant to the severity regulations, the claimant must make a threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities.¹³ If the claimant is unable to show that his impairments would have more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits.¹⁴ If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the decision maker proceeds to step three.¹⁵ The ALJ in this case concluded that plaintiff satisfied the severity requirement based on the following impairments: an affective disorder with complaints of seizure activity brought on by stress; history of rectal bleeding secondary to internal hemorrhoids; and status post flexor tendon release of the second, third and fourth toes of the right foot with webbing operation to the second and third toe of the right foot. Thus, the ALJ proceeded to step three.

In step three, the ALJ “determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity.”¹⁶

¹¹*Id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. 2287, 2291 (1987)).

¹²*Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

¹³*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

¹⁴*Id.* at 751.

¹⁵*Id.*

¹⁶*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

If the impairment is listed and thus conclusively presumed to be disabling, the claimant is entitled to benefits.¹⁷ If not, the evaluation proceeds to the fourth step, where the claimant must show that the “impairment prevents [the claimant] from performing work he has performed in the past.”¹⁸ If the claimant is able to perform his previous work, he is not disabled.¹⁹ With respect to the third step of the process in this case, the ALJ determined that plaintiff’s impairments were not listed or medically equivalent to those listed in the relevant regulations. At the fourth step, the ALJ concluded that plaintiff did not have any past relevant work experience.

Thus, the ALJ proceeded to the fifth and final step of the sequential evaluation process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of his age, education, and work experience.”²⁰ At that point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”²¹ At this step, the ALJ concluded that plaintiff was not disabled, a conclusion that rested on a finding that plaintiff, despite possessing certain physical and mental limitations, nonetheless could perform a significant number of jobs in the state and national economies, including light work such as garment inspector and order filler.

¹⁷*Id.*

¹⁸*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 107 S. Ct. at 2291).

¹⁹*Id.*

²⁰*See id.* (quoting *Bowen v. Yuckert*, 107 S. Ct. at 2291).

²¹*See id.* (citations omitted); accord *White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

IV. Analysis of Plaintiff's Specific Arguments

In his motion, plaintiff contends that the ALJ made three errors in reaching his decision: (a) he failed to accord adequate weight to the opinions of the psychologists and psychiatrist; (b) he failed to assess properly plaintiff's subjective complaints of disabling symptoms; and (c) he failed to find plaintiff's impairments equivalent to a listed impairment. The Court addresses each of these arguments in turn.

A. Disregarding Dr. Okano's Opinion and Dr. Dattore's Opinion

In his decision, the ALJ expressly disregarded a December 27, 1999, opinion of Dr. Dattore, a consultative psychologist who examined plaintiff; and completely ignored an August 20, 1999, opinion of Dr. Okano, a treating psychiatrist. According to the Tenth Circuit, a treating source's opinion is not dispositive on the ultimate issue of disability,²² but the ALJ must give "controlling weight" to the opinion of a treating source, provided that opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques."²³ If the opinion is well supported, then the ALJ must confirm that it is consistent with other substantial evidence in the record.²⁴ If these requirements are not present, the opinion is not entitled to controlling weight.²⁵ If, after this determination, the ALJ decides the treating source's opinion is not entitled to controlling weight, the opinion is still entitled to deference and must be weighted using factors such as: the length of the treatment relationship, the frequency of examination, nature and extent

²²*Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)(citing 20 C.F.R. §§ 404.1527(e)(2), 416.927(d)(2)).

²³*Watkins v. Barnhart*, 350 F.3d 1297, 1300 (10th Cir. 2003) (quoting Soc. Sec. Reg. 96-2p, 1996 WL 374188, at *2)).

²⁴*Id.*

²⁵*Id.*

of treatment provided, the extent to which the opinion is supported by objective medical evidence, the opinion's consistency with the record as a whole, and other factors brought to the attention of the ALJ that tend to support or contradict the opinion.²⁶ In short, the ALJ cannot disregard a treating source's opinion that a claimant is disabled without giving legitimate and specific reasons for doing so.²⁷

The ALJ must give the most weight to a treating psychologist's opinion, opinions of psychologists who have examined the claimant are given less weight, and opinions of psychologists who merely review the claimant's records are to be given the least amount of weight.²⁸ In addition, the ALJ must consider the same specific factors used for the treating psychologist when deciding the weight to give any other psychologist's opinion, including the length of the treatment relationship, the frequency of examination, and the extent to which the opinion is supported by objective medical evidence.²⁹

In this case, the ALJ did not even mention treating psychiatrist Dr. Okano's opinion. Plaintiff presented to Shawnee Community Mental Health Center (the Center) on July 6, 1999, where Dr. Okano is a psychiatrist. On August 18, 1999, Dr. Okano first saw plaintiff for his mental impairments, and on August 20, 1999, Dr. Okano filled out a form called "Mental Impairment Questionnaire (RFC & Listings)", which is the opinion in issue. Thereafter Dr. Okano saw plaintiff once a month for the next two months. During this time, plaintiff was also seen by social workers who worked with Dr. Okano at the Center. The

²⁶*Robinson v. Barnhart*, No. 03-2170, 2004 WL 729273, at *3 (10th Cir. April 6, 2004) (quoting *Watkins*, 350 F.3d at 1300-01; Soc. Sec. Reg. 96-2p)).

²⁷*See Goatcher v. U.S. Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) (citing *Frey v. Bowen*, 816 F.2d 508, 513 (10th Cir. 1987)).

²⁸*Talbot v. Heckler*, 814 F.2d 1456, 1463 (10th Cir. 1987).

²⁹*Goatcher*, 52 F.3d at 290.

record shows plaintiff was last seen at the Center on October 28, 1999.

Defendant questions whether Dr. Okano was a “treating” psychiatrist. Treating psychiatrists are defined in 20 C.F.R. § 416.902, as “your own physician, psychologist, or other acceptable medical source who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you.” The regulation goes on to say that a psychologist will be considered a treating source even if plaintiff was only seen by him on a few occasions, as long as the frequency of visits are typical for the condition.³⁰ Further, a psychologist will not be considered a treating source if plaintiff’s relationship with the psychologist is based solely on plaintiff’s need to obtain a report in support of his disability claim.³¹ Plaintiff went to Shawnee Community Mental Health Center for treatment, not to receive a report to file with his disability claim. Plaintiff received psychotherapy and medications from Dr. Okano and the employees at the Center.

Dr. Okano was plaintiff’s treating psychiatrist from at least August 18, 1999, to October 28, 1999, and the ALJ must either give Dr. Okano’s RFC assessment controlling weight or explain his reasons for giving less weight to the opinion. Either way, it is an error for the ALJ to simply ignore the opinion when making his decision.

The ALJ expressly disregarded the opinion of Dr. Dattore, a consultative psychologist. Dr. Dattore’s opinion was based on an evaluation of plaintiff on December 27, 1999, and includes a narrative psychological assessment, a form entitled “Medical Assessment of Ability to do Work Related Activities (Mental)” (medical assessment), and an October 2, 2000, letter from Dr. Dattore explaining his

³⁰20 C.F.R. § 416.903.

³¹*Id.*

findings in rebuttal of the Appeals Council's decision to remand the case after the first ALJ opinion. Dr. Dattore performed several tests, including clinical assessment, mental status assessment, WAIS-III, WMS-III, and MMPI-2 tests. After performing the tests, Dr. Dattore determined that plaintiff suffered from Schizoaffective Disorder. Dr. Dattore noted plaintiff's abilities as "poor or none" in all but four of the fifteen evaluative parts of a form that assesses occupational, performance and personal-social adjustments. The four parts that were not rated "poor or none" were rated "fair." The ALJ disregarded Dr. Dattore's opinion on the grounds that it was "conclusory and not supported by the totality of the medical evidence, the lack of any mental health treatment for claimant after October 1999, the medical expert's testimony, as well as the psychiatric evaluation by Dr. Voth."

It was proper for the ALJ to rely on the fact that plaintiff has not received consistent mental health treatment despite claiming that he suffers from debilitating mental problems. But the ALJ erred in finding that the totality of the medical evidence did not support Dr. Dattore's opinion. In fact, the only medical evidence the ALJ cites as contrary to Dr. Dattore's opinion is a September 9, 1999 treatment note. In this treatment note, plaintiff reported that: he was less anxious and more able to focus; his medication was helping; and his family could notice the difference in him. Plaintiff further reported that he was capable of working, and did not know why he quit his jobs. The ALJ did not identify any medical evidence that refuted or contradicted Dr. Dattore's findings from the tests he performed.

While ignoring the opinion of the treating psychiatrist, and expressly disregarding the opinion of the consultative psychologist, the ALJ relied on the testimony of Dr. Chance and the opinion of Dr. Voth. Dr. Chance, a psychologist, testified that he did not believe plaintiff had a disabling mental disorder. Dr. Chance had neither treated nor examined plaintiff; he had merely reviewed the records. As a reviewing

psychologist his opinion would generally be given the least weight; it was error to give his opinion weight while ignoring or inexplicably disregarding the opinions of the treating psychiatrist and consultative psychologist.

Similarly, it was error to give weight to the opinion of Dr. Voth, an examining, non treating psychologist, while inexplicably ignoring or disregarding the opinions of the treating psychiatrist and the other consultative psychologist. Notably, Dr. Voth examined plaintiff for twenty minutes, and performed no tests. In contrast, the other consultative psychologist, Dr. Dattore, saw plaintiff on two occasions, and performed several tests on which he based his opinion.

The ALJ relied on certain statements of Dr. Voth in a form “Medical Source Statement of Ability to do Work-Related Activities (Mental).” The ALJ relied on Dr. Voth’s statement that he did not necessarily agree with a diagnosis of psychoses in plaintiff, but was “hard pressed” to come up with a diagnosis because he believed plaintiff was exaggerating his symptoms. Yet the ALJ failed to note that Dr. Voth was also unable to determine whether plaintiff would be able to work, stating, “[w]hether he could work or not, I do not know.”

Moreover, the ALJ apparently disregarded Dr. Voth’s statements that corroborate the findings of Dr. Dattore and Dr. Okano. Dr. Voth stated that plaintiff has “marked” abilities with respect to: understanding, remembering, and carrying out detailed instructions; responding appropriately to work pressures in a usual work setting; and responding appropriately to changes in a routine work setting. Dr. Voth stated that plaintiff would have “extreme” abilities with respect to interacting appropriately with the public. In short, even if it was proper to give greater weight to Dr. Voth’s opinions, there was not substantial evidence refuting the opinion of Dr. Dattore and Dr. Okano.

On remand, the ALJ must give controlling weight to Dr. Okano's opinion for the time he was plaintiff's treating psychiatrist, or give a sufficient explanation of the weight to be accorded Dr. Okano's opinion. He should further examine and explain the weight he is giving to the opinions of Drs. Dattore, Voth, and Chance.

Although the fact that the ALJ failed to discuss the treating psychiatrist's opinion is enough to remand the case, the Court will discuss plaintiff's other arguments on appeal.

B. Assessment of Plaintiff's Credibility

Plaintiff asserts that the ALJ erred by failing to properly assess the credibility of plaintiff's claims that his physical and mental impairments are disabling. In the Tenth Circuit, the ALJ must decide whether a claimant's subjective claims are credible, considering such factors as a claimant's persistent attempts to find relief and his willingness to try any treatment prescribed; regular contact with a doctor; the claimant's daily activities; the dosage, effectiveness, and side effects of medication; and subjective measures of credibility that are peculiarly within the judgment of the ALJ.³² Moreover, the ALJ must give specific reasons why he rejects a claimant's subjective complaints.³³ Ultimately, credibility determinations "are peculiarly the province of the finder of fact," and should not be upset if supported by substantial evidence.³⁴

Plaintiff agrees that the ALJ made specific findings regarding his credibility but contends that the ALJ's analysis was flawed. The Court agrees. While the ALJ appropriately determined and applied some

³²*Luna v. Bowden*, 834 F.2d 161, 165-66 (10th Cir. 1987); *Huston v. Bowen*, 838 F.2d 1125, 1132 (10th Cir. 1988).

³³*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

³⁴*Id.* (citing *Kepler*, 68 F.3d at 390-91).

of the *Luna*³⁵ factors, the ALJ erred in other respects. The ALJ properly considered plaintiff's minimal work history as one factor in his credibility determination.³⁶ The ALJ properly considered the fact that plaintiff had received minimal treatment for his mental and physical symptoms. The ALJ also properly considered plaintiff's activities of daily living according to the activities questionnaire. Plaintiff had no problems attending to his personal needs. Plaintiff was able to do chores such as cooking, vacuuming, and shopping for groceries. Plaintiff could appropriately interact with friends, and plaintiff could handle the family finances.

The ALJ also appropriately considered whether there was objective medical evidence supporting plaintiff's subjective complaints of physical impairment. As the ALJ noted, physical examinations of plaintiff had been normal and unremarkable, thus not supporting plaintiff's subjective complaints of physical impairment.

But the ALJ erred in finding that there was no objective medical evidence supporting plaintiff's complaints of mental impairment. The ALJ's improper disregard of the treating psychiatrist's opinions, and his inexplicable discrediting of the Dr. Dattore's opinion, render his credibility analysis insufficient. The ALJ erred in stating that there was no medical evidence consistent or supportive of plaintiff's subjective complaints of mental impairment. The ALJ relies on the lack of inpatient hospitalization and lack of treatment notes recording a severe mental problem. But the absence of evidence is not sufficient evidence on which the ALJ can rely.³⁷ In fact, defendant had Drs. Dattore and Voth examine plaintiff, and

³⁵ 834 F.2d at 165-66.

³⁶ See *Bean v. Chater*, 77 F.3d 1210, 1213 (10th Cir. 1995) (citing Soc. Sec. Reg. 88-13).

³⁷ *Miller v. Chater*, 99 F.3d 972, 976 (10th Cir. 1996).

Dr. Chance review the records, because the objective evidence of mental impairment had consisted of Dr. Okano's records and the records from Shawnee Comm. Mental Health Center. On remand, the ALJ must explain his reliance or non reliance on the objective evidence generated by the medical practitioners.

C. PRT Form and the Listing of Impairments

Plaintiff argues that the ALJ did not articulate his findings or state substantial evidence for them on the Psychiatric Review Technique Form (PRT form) completed by the ALJ; and that as a result, the ALJ erroneously determined that plaintiff's impairments were not equivalent to any in the listing of impairments. The Court notes that it is unable to find a PRT form in the record that the ALJ filled out. However, the ALJ did use PRT form language in his opinion when he determined: that plaintiff would have a mild degree of limitation in his activities of daily living and social functioning; that plaintiff had a moderate degree of limitation in maintaining concentration, persistence, or pace; and that there was no evidence indicating that plaintiff would experience repeated episodes of decompensation.

In order for a claimant to be considered disabled based on a mental impairment listing, "the [Commissioner] must follow the procedure for evaluating mental impairments set forth in 20 C.F.R. §404.1250a and the Listing of Impairments and document the procedure accordingly."³⁸ This requires the ALJ to fill out a PRT form, which determines the severity of the claimant's mental impairments.³⁹ The form can be filled out by the ALJ with or without the assistance of a medical advisor.⁴⁰ In order for the ALJ's

³⁸*Cruse v. U.S. Dep't. of Health & Human Servs.*, 49 F.3d 614, 617 (10th Cir. 1995) (citing *Andrade v. Sec'y of Health & Human Servs.*, 985 F.2d 1045,1048 (10th Cir. 1993)).

³⁹*Id.*

⁴⁰*Id.*

findings to be considered sufficient, “the record must contain substantial competent evidence to support the conclusions recorded on the PRT form, [and] if the ALJ prepares the form himself, he must ‘discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form.’”⁴¹ The ALJ should reevaluate plaintiff’s impairments on the PRT form after he considers the opinion of the psychiatrist and reconsiders the opinions of the psychologists. The ALJ should list his findings with particularity and explain them sufficiently in his opinion.

V. Conclusion

Therefore, the Court finds that this action should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to conduct further proceedings as follows:

Upon receiving the court’s final order of remand, the Appeals Council of the Social Security Administration will remand this case and direct the ALJ to reassess the severity of plaintiff’s impairments, in accordance with the statute and regulations, including the evaluation of plaintiff’s RFC. The ALJ will further consider the impact of Dr. Okano’s opinion on the entire decision, including plaintiff’s credibility, the findings on the PRT form, and whether plaintiff’s impairment is equivalent to one in the listing of impairments. The ALJ will consider, examine and explain the relative weight given to the opinions of Drs. Okano, Dattore, Voth, and Chance. The ALJ will give specific reasons for his resultant findings. The ALJ will reassess plaintiff’s ability to perform a significant amount of jobs in the national economy after reexamining his conclusions about plaintiff’s RFC.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant’s decision denying plaintiff disability benefits is **REVERSED AND REMANDED** pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further proceedings in accordance with this Memorandum and Order.

IT IS SO ORDERED.

Dated this 27th day of May, 2004, at Topeka, Kansas.

⁴¹*Id.* 617-18 (quoting *Washington v. Shalala*, 37 F.3d 1437 (10th Cir. 1994)).

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

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